Supreme Court, U.S.
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No. 95-1162

In the Supreme Court of the United States

OCTOBER TERM, 1995

JERRY L. SUMPTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether a debtor's affirmative acts to thwart the collection of his delinquent federal income taxes constitute a willful attempt to evade or defeat such taxes within the meaning of Section 523(a)(1)(C) of the Bankruptcy Code, 11 U.S.C. 523(a)(1)(C).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is unpublished, but the decision is noted at 64 F.3d 663 (Table). The opinion of the district court (Pet. App. 27-49) is reported at 170 B.R. 908. The opinion of the bankruptcy court (Pet. App. 50) is reported at 136 B.R. 690.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1995. The petition for a writ of certiorari was filed on November 20, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1979, petitioner created a trust for the benefit of his children. Other family members and friends were designated as trustees (Pet. App. 3). Sumpter & Perry, P.C., of which petitioner owns nearly all the stock, leases its office space and regularly borrows money from the trust (Pet. 2; Pet. App. 3-4, 32). By its terms, however, the trust is prohibited from lending money directly to petitioner. Prior to January 1988, petitioner had never borrowed from the trust (*id.* at 5).

In August 1986, the Internal Revenue Service notified petitioner of assessments for income taxes due from him for the years 1984 and 1985. A demand for payment of those taxes was also made at that time. In August 1987, the Service made assessment and demand for payment of the taxes due from petitioner for the years 1981 and 1982 (Pet. App. 4). Additional notices and demands for payment were sent to petitioner in December 1987 (*ibid.*). Two weeks after receiving these last notices, petitioner and his wife gave mortgages of their property to the trust to secure a $90,000 loan that the trust made to them at that time (*id.* at 3, 4-5).

On April 21, 1988, an IRS agent informed petitioner that the IRS would soon file notices of tax liens with the local registry of deeds (Pet. App. 5). Later that same day, petitioner transferred title to the mortgaged properties to the trust and the trust cancelled the underlying debt (*id.* at 5-6). Less than two weeks later, the Service filed its notices of tax lien (*id.* at 6).

2. In 1989, petitioner filed for relief under Chapter 7 of the Bankruptcy Code and sought a discharge of his federal tax debts (Pet. App. 6). The government

brought an adversary proceeding, claiming that petitioner's tax liabilities were nondischargeable under Section 523(a)(1)(C) of the Bankruptcy Code, which provides that a debtor is not discharged from a tax debt if he "willfully attempted in any manner to evade or defeat such tax" (11 U.S.C. 523(a)(1)(C)).

Petitioner admitted that one of his reasons for transferring the properties to the trust in April 1988 was to avoid the effect of the federal tax liens on the properties (Pet. App. 14, 44-45). He contended, however, that Section 523(a)(1)(C) does not apply to attempts to evade or defeat the *collection* of a tax liability, but only to attempts to evade or defeat the *determination* of the underlying tax liability (Pet. App. 9-10, 40-41). The bankruptcy court rejected petitioner's interpretation of the statute and granted summary judgment in favor of the government (*id.* at 28-29, 50).

3. The district court affirmed (Pet. App. 27-49). The court held that "§523(a)(1)(C)'s modifying phrase 'in any manner' is expansive enough to include evading or defeating *collection or payment of* a tax" (*id.* at 43). The court rejected as "spurious" petitioner's suggestion that his intent to avoid the tax liens by transferring properties to the trust was not evidence of an intent to evade or defeat taxes without proof that he had equity in the properties (*id.* at 46-49). The court held that Section 523(a)(1)(C) did not require that the attempt to evade or defeat the tax obligation be successful, only that it be willful (Pet. App. 47).

4. The court of appeals affirmed (Pet. App. 1-26). The court interpreted the words "in any manner" in Section 523(a)(1)(C) "to encompass attempts to thwart payment of taxes" (Pet. App. 12-13). Noting that the

attachment of a federal tax lien to assets "is usually the first step taken by the IRS" to enforce payment of a tax, the court held that petitioner's admitted attempt to evade the effect of these liens was sufficient to trigger the exception to dischargeability of Section 523(a)(1)(C) (Pet. App. 15). Noting that petitioner had admitted that he had transferred the property in part to avoid the federal tax liens, the court held that petitioner had attempted to evade or defeat collection of the taxes within the meaning of the nondischargeability statute (*id.* at 17-20).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Under Section 727 of the Bankruptcy Code, a debtor in a Chapter 7 case is generally discharged from all debts that arose before the filing of the bankruptcy petition. 11 U.S.C. 727(b). Under Section 523(a)(1)(C) of the Code, however, an individual debtor is not discharged "from any debt * * * for a tax * * * with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax." 11 U.S.C. 523(a)(1)(C). This case does not involve a fraudulent return; it involves only the second clause of Section 523(a)(1)(C), which denies discharge when there has been a "willful[] attempt[] in any manner to evade or defeat such tax."

The language of Section 523 is straightforward. Congress did not provide any specialized definitions for its terms. The words are therefore to be interpreted with their ordinary, everyday meaning. See

Commissioner v. *Soliman*, 506 U.S. 168, 174 (1993); *Malat* v. *Riddell*, 383 U.S. 569, 571 (1966) (per curiam).[1]

a. The court of appeals concluded that the broad phrase used in Section 523(a)(1)(C) — "in any manner to evade or defeat such tax" — encompasses not only a debtor's attempt to evade or defeat the assessment of a tax but also a debtor's attempt to evade or defeat the payment or collection of a tax already assessed by concealing or transferring his property in an effort to avoid the effect of the tax lien (Pet. App. 12-17). That same interpretation of the statute has been applied in several recent decisions. See, *e.g.*, *Dalton* v. *IRS*, 77 F.3d 1297 (10th Cir. 1996) (tax debts nondischargeable under Section 523(a)(1)(C) because debtor attempted to conceal assets from IRS by placing them in his wife's name); *In re Bruner*, 55 F.3d 195 (5th Cir. 1995) (tax debts nondischargeable under Section 523(a)(1)(C) because debtor attempted to conceal assets from IRS and engaged in pattern of non-payment and non-filing). As the court stated in *Dalton* v. *IRS*, *supra*, the statutory phrase "in any manner" is "sufficiently broad to include willful attempts to evade taxes by concealing assets to protect them from execution or attachment." 77 F.3d at 1301.

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[1] Petitioner does not contend that the word "willfully" as it appears in Section 523(a)(1)(C) requires a criminal state of mind or that the government must prove the elements of criminal tax evasion in order to satisfy the discharge exception. Courts have consistently interpreted the term "willful" in civil tax statutes to mean voluntary, conscious or intentional. *In re Toti*, 24 F.3d 806 (6th Cir.), cert. denied, 115 S. Ct. 482 (1994). See, *e.g.*, *Domanus* v. *United States*, 961 F.2d 1323, 1326 (7th Cir. 1992); *Collins* v. *United States*, 848 F.2d 740, 742 (6th Cir. 1988).

The common meaning of the word "evade"—in connection with tax obligations—is "to fail to pay or to minimize (taxes) in violation of law." *Webster's Third New International Dictionary* 786 (1986). See also *Black's Law Dictionary* 554 (6th ed. 1990). The common definition of the word defeat—in connection with a legal obligation—is "[t]o prevent, frustrate, or circumvent; as in the phrase 'hinder, delay, or defeat creditors'" (*id.* at 418). Applying the ordinary meaning of these statutory terms, the court of appeals correctly held in this case that petitioner's attempt to thwart efforts to collect his tax liabilities by transferring his properties for the admitted purpose of frustrating the effectiveness of the federal tax liens was a willful attempt "in any manner to evade or defeat" his tax liability (Pet. App. 12-17). Through these affirmative acts, petitioner attempted to frustrate and defeat the collection of the tax.

2. Petitioner errs in asserting (Pet. 1) that *In re Toti*, 24 F.3d 806 (6th Cir.), cert. denied, 115 S. Ct. 482 (1994)—on which the court of appeals relied in this case (Pet. App. 12-13)—is in conflict with *In re Haas*, 48 F.3d 1153 (11th Cir. 1995). In *Toti*, the debtor sought a discharge for taxes after he had knowingly failed to file his tax returns and pay the taxes due. The debtor argued in *Toti* that Section 523(a)(1)(C) of the Bankruptcy Code prohibits discharge only when the debtor has committed an affirmative act that would be felonious under 26 U.S.C. 7201 (willful attempt to evade or defeat tax) and does not prohibit discharge for acts of omission that would constitute misdemeanors under 26 U.S.C. 7203 (willful failure to file return or pay tax). The court of appeals disagreed, holding that Section 523(a)(1)(C) includes both acts of commission and acts of omission. 24 F.3d at

809. The court concluded that where a debtor knowingly fails to file returns and pay taxes, the taxes are nondischargeable in bankruptcy. *Ibid.*

Haas involved a different situation. In *Haas*, the debtor simply failed to pay his tax liability. Unlike the debtor in *Toti*, the debtor in *Haas* had properly filed his returns and reported his taxes. In that context, the Eleventh Circuit held in *Haas* that "a debtor's failure to pay his taxes, alone, does not fall within the scope of section 523(a)(1)(C)'s exception to discharge in bankruptcy." 48 F.3d at 1158. The court noted in *Haas* that Section 523(a)(1)(C) of the Bankruptcy Code, unlike 26 U.S.C. 7201, does not include the phrase "or the payment thereof."[2] The court reasoned that the passive act of failing to pay is therefore not sufficient by itself to prevent discharge. 48 F.3d at 1156, 1157.

The question whether a mere omission to pay an outstanding tax would, by itself, prohibit discharge was not addressed either in this case or in *Toti*. Neither this case nor *Toti* involved "mere nonpayment." Petitioner did not simply fail to pay his taxes;

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[2] See also 26 U.S.C. 6531(2) (establishing period of limitation on criminal prosecution of various offenses arising under Internal Revenue Code, including "the offense of willfully attempting in any manner to evade or defeat any tax *or the payment thereof*" (emphasis added)); 26 U.S.C. 6653 (imposing penalty upon any person who "willfully attempts in any manner to evade or defeat any such tax *or the payment thereof*" (emphasis added)); 26 U.S.C. 6672 (imposing civil penalty on person who "willfully attempts in any manner to evade or defeat any such tax *or the payment thereof*" (emphasis added)); 26 U.S.C. 7201 (making guilty of felony person who "willfully attempts in any manner to evade or defeat any tax imposed by this title *or the payment thereof*" (emphasis added)).

he also acted affirmatively to defeat collection by transferring property in an effort to shield it from the federal tax liens.[3]

Under circumstances similar to those in this case —failure to pay combined with an affirmative act to prevent collection—the Tenth Circuit recently agreed with *Haas* that mere failure to pay alone does not prevent discharge. *Dalton* v. *IRS*, 77 F.3d at 1301. The court in *Dalton* also agreed with the court here, however, that when a failure to pay is accompanied by an affirmative act to evade or defeat collection, Section 523(a)(1)(C) applies to prevent discharge. 77 F.3d 1300-1301. In applying Section 523(a)(1)(C) to a spectrum of misconduct, the courts of appeals have thus reached consistent, not conflicting, decisions. See *Dalton* v. *IRS*, *supra*; *In re Bruner*, *supra*; *In re Haas*, *supra*; *In re Toti*, *supra*.

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[3] Contrary to petitioner's contention (Pet. 11-19), the court of appeals did not base its conclusion that he had attempted to evade or defeat his taxes solely on the finding that he had transferred properties to the trust for the admitted purpose of avoiding the tax lien—although that would have been sufficient. The court also relied on other undisputed facts and permissible inferences concerning the entire sequence of events culminating in the transfer in reaching that conclusion (Pet. App. 18-20).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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